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No. 484

In the Supreme Court of the United States

OCTOBER TERM, 1960

WESTINGHOUSE BROADCASTING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, RADIO CORPORATION OF AMERICA AND NATIONAL BROADCASTING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

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Pursuant to Rule 16, paragraphs 1(a) and 1(c) of the Revised Rules of this Court, appellee United States moves that the appeal be dismissed, or, alternatively, that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a district court judgment denying intervention in a civil antitrust suit

brought by the United States. Appellant sought to intervene on the ground that certain proposed transactions, designed to effectuate compliance with a consent judgment by which the suit had been settled, allegedly violated such judgment.

The Government's suit, brought against the Radio Corporation of America ("RCA") and its wholly-owned subsidiary, the National Broadcasting Company ("NBC"), charged that the defendants had engaged in a conspiracy, and had been parties to an agreement, in unreasonable restraint of trade. The facts relating to the case are set forth in this Court's opinion in *United States* v. *Radio Corporation of America*, 358 U.S. 334. There this Court held that approval by the Federal Communications Commission of certain aspects of the challenged transactions did not oust the district court of jurisdiction to entertain the Government's antitrust case, and reversed the district court's dismissal of the complaint. Following that decision, the case was settled through entry of a consent judgment, the provisions of which are set out in full at pages A3 to A12 of the Jurisdictional Statement.

The gravamen of the Government's complaint was that RCA and NBC had conspired to use NBC's power to withhold network affiliation to acquire television stations in two of five cities where NBC wished to acquire a station (Philadelphia, Detroit, Boston, San Francisco and Pittsburgh); and that, pursuant to such conspiracy and under threat of loss or denial of network affiliation in cities in addition to Philadelphia, appellant Westinghouse Broadcasting Com-

pany was induced to exchange its Philadelphia station (WRCV-TV) for NBC's Cleveland station (see *United States* v. *Radio Corporation of America*, *supra*, at 335-336).

Section V of the judgment (J.S. A8-A9) requires NBC to dispose of its Philadelphia television and radio stations by the end of 1962, provides for 30 days written notice to the Government of any disposition that is to be accomplished by an exchange of stations, and gives the Government the right to apply to the court for a determination that such exchange violates certain terms of the judgment.[1] Section IV(B) (J.S. A6-A7) provides for similar notice to the Government and opportunity for it to seek such a judicial determination should NBC seek to acquire a television station in Detroit, Boston, San Francisco or Pittsburgh.[2]

Shortly after the entry of the decree, NBC offered to exchange WRCV-TV for Westinghouse's Boston, Pittsburgh or San Francisco stations. Westinghouse counter-offered to re-exchange its Cleveland station for WRCV-TV (J.S. 6). No agreement was reached, however, and NBC subsequently agreed with RKO-General to exchange WRCV-TV for the RKO Boston station WNAC-TV, then a CBS affiliate.

NBC gave the Government notice of this proposed exchange. The Government made a thorough inves-

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[1] Those terms require defendants to abstain from certain types of coercive activity or otherwise unreasonably restraining trade in making acquisitions.

[2] NBC already owned television stations in New York, Chicago, Los Angeles and Washington, in addition to Philadelphia.

tigation of the transaction, during which it interviewed 42 television network and station officials (including five officials of, and counsel for, appellant), and examined considerable documentary material bearing on the exchange (R. 103-110). On the basis of this investigation, the Government concluded that the proposed exchange in no way violated the consent judgment, and it advised the court that it did not intend to oppose it (R. 32-33).

Appellant then moved to intervene in the case.[3] It asserted that the exchange would probably mean the transfer of the NBC affiliation from its Boston station to that to be acquired by NBC; and it sought intervention in order to argue that the exchange would contravene the provisions of the consent decree (R. 26-27). The Government, after carefully considering the motion and supporting memoranda, concluded that they provided no basis for the claim that the decree had been violated, and therefore opposed intervention (R. 68-69, 72-73).[3]

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[3] Appellant asserts that the Government has shifted its position in this regard (J.S. 8), and quotes from the transcript of the oral argument below a passage which it claims supports this allegation. Examination of the transcript of oral argument as a whole (see particularly R. 34-35, 39) reveals that the Government merely stated that it hoped the court would hear any would-be intervenor on the issue of whether intervention was proper, although the Government would take the position that appellant could not intervene as a matter of right. Subsequently, when it had time to examine the motion papers, and the memorandum filed in support thereof, the Government took the position that permissive intervention was also not warranted (R. 68-69, 72-73).

The motion was heard and denied by District Judge Kirkpatrick, who had entered the consent decree. The court held (J.S. A1-A2) that appellant could not intervene as of right; and that, since the Government had "carefully investigated and reviewed all the facts" respecting the proposed exchange and had concluded that it did not violate the decree, the court would not allow discretionary intervention even if it could do so (J.S. A2). The court concluded (*ibid*):

> It would not lead to an orderly administration of justice to allow intervention in this type of antitrust litigation over the objection of the authorized agency of the United States in charge of enforcing a decree which it has obtained. The movant, if it is aggrieved, must be left to such private remedy as Congress may have provided for it.

ARGUMENT

This Court has made clear, in a number of cases, the very limited circumstances under which private parties, whose economic interests allegedly will be adversely affected, are entitled to intervene in post-decree proceedings in antitrust cases. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19; *Wometco Television & Theatre Co.* v. *United States*, 355 U.S. 40. See also *United States* v. *Loews Inc.*, 136 F. Supp. 13, 14 (S.D.N.Y.); *United States* v. *Bendix Home Appliances*, 10 F.R.D.

73 (S.D.N.Y.); *United States* v. *Bearing Distributors Company*, 18 F.R.D. 228 (W.D. Mo.). The present appeal presents still another example of a case where there is no intervention of right under the terms of the decree (see *Missouri-Kansas Pipe Line Co.* v. *United States*, *supra*) or under Rule 24 (a) of the Federal Rules of Civil Procedure, and where the trial court clearly did not abuse its discretion in denying permissive intervention under Rule 24(b).

1. Appellant's sole claim to intervention as of right (J.S. 9-10) is based on Rule 24(a)(3), which provides for intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court". But the availability of this section has always been limited to persons having "an interest [in the property to be disposed of] known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal." 4 Moore's *Federal Practice* ¶ 24.09[2].

In the instant case the appellant has no legal interest in the Philadelphia television station, the disposition of which, pursuant to the consent decree, is subject to the control of the district court. Its claim to being adversely affected by disposition of the station stems solely from the potential loss of an NBC network affiliation by its Boston station, as the probable consequence of NBC's acquisition of a station in

Boston, in exchange for which NBC would transfer its Philadelphia station.

Such indirect competitive injury, however, even if clearly shown to be a probable result of the transaction, is not the type of interest which gives a right to intervention under Rule 24(a)(3). Thus, in *Allen Calculators Inc.* v. *National Cash Register Co., supra*, an antitrust consent decree precluded National from acquiring any competing manufacturer without prior permission of the court. When such permission was subsequently sought, Allen Calculators, a competitor of National's, sought to intervene in opposition. On appeal from an order denying such intervention, it claimed, *inter alia*, a right to participate under Rule 24(a)(3). But this Court summarily rejected the claim, stating "nor had it any interest in the distribution or disposition of property in the custody of the court so as to come under (3)" (322 U.S. at 141). See also *Ex Parte Leaf Tobacco Board of Trade*, 222 U.S. 578, where this Court rejected the claim of tobacco leaf sellers that they had a right to intervene in the proceedings on remand following the decision in *United States* v. *American Tobacco Co.*, 221 U.S. 106, although they alleged that they had a "vital interest" in relief which would dissolve the tobacco trust which had injured them. Such interest, the Court held (p. 581), was not "of such a character as to authorize them" to intervene as of right.

Moreover, even where a would-be intervenor's stake in property to be disposed of is sufficient to bring it within Rule 24(a)(3), it must also show that the al-

leged adverse effect of the disposition upon it is "imminent and onerous" rather than being merely "speculative and * * * contingent on unknown factors" (*Sutphen Estates* v. *United States*, *supra*, 342 U.S. 19, 22-23). Here, however, appellant made no showing whatsoever in the court below that it would in fact suffer financially or otherwise, as a result of the probable loss of an NBC affiliation. There are three commercial television stations in Boston and three national television networks, and there is no indication in the record before the district court that appellant cannot secure another affiliation of equal value to replace the one it may lose. In these circumstances, "appellant has not maintained the burden of showing that under Rule 24(a)(3) it may intervene as of right" (*id.*, p. 22).[4]

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[4] Since the appellant does not come under any of the provisions of Rule 24(a) setting forth the conditions as to when intervention is of right, and asserts no authority outside of the rule, the Court need not consider the district court's ruling that it had no jurisdiction to consider appellant's intervention request because of the express provision of the consent decree retaining jurisdiction "for the purpose of enabling any of the parties to this Final Judgment, and no one else, to apply to this Court" for further orders arising out of the decree (J.S. A11). We know of no court decision in conflict with this view. See *United States* v. *Loews Inc.*, 136 F. Supp. 13, 14 (S.D.N.Y.); cf. *Buckeye Coal & R. Co.* v. *Hocking Valley R. Co.*, 269 U.S. 42. *United States* v. *Swift & Co.*, 286 U.S. 106, 114, cited by appellant (J. S. 10), is not in point. While that case does stand for the proposition that a court has inherent jurisdiction to reopen a decree where equity demands, the question to which the district court directed its attention here was not whether it would have had discretion to permit appellant to intervene in any proceeding initiated by it or the parties to the decree, but whether, where

2. It is equally clear that the district court did not abuse its discretion in determining that no grounds for permissive intervention existed here. See *Brotherhood of R. R. Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 524. This conclusion was not reached, as appellant suggests (J.S. 12), "merely" on grounds that "since plaintiff opposed intervention * * * the Court would not as a matter of law exercise its discretion to permit intervention". The Government had previously advised the court that it did not expect to oppose the transfer since its comprehensive investigation (then not quite completed) had failed to disclose facts indicating that the decree had been violated or that any restraint of trade was involved (R. 32-33). At the same time, however, the Government had informed the court of appellant's intention to seek intervention and, though it indicated a belief that appellant had no right to intervene, it asked that appellant be heard on that motion (R. 34-35, 39). When the Government subsequently examined the motion and accompanying pleadings, and concluded that appellant (whose officers it had previously interviewed (R. 108)) had no new facts or legal theories to offer, the Government then also opposed permissive intervention (R. 68-69). The court reached its decision that the "orderly administration of justice" would not be served by permitting inter-

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none of the parties authorized by the judgment to initiate further proceedings had done so, a person not party to the decree could "intervene" for the purpose of inaugurating such a proceeding on its own.

vention ([redacted] A2) only (1) after pointing out that the Government had "carefully investigated and reviewed all the facts" and had concluded that there was no basis for intervention ([redacted] A1-A2), and (2) after it had had an opportunity to consider the written and oral presentation by the appellant as to the bases for its claim that the transfer violated the decree (see R. 52-67).

Even assuming that appellant has met its burden of showing that its claim and the main action have "a question of law or fact in common" within the meaning of Rule 24(b)(2) by its vague statements at page 11 of the Jurisdictional Statement, we submit that the court below properly denied permissive intervention. As the district court held in denying a similar motion in *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76-77 (S.D.N.Y.):[5]

> But certainly where, as in the case at bar, the United States has taken no action under the decree against the defendant; where, indeed, the United States has sifted the proposed intervenors' complaints and has decided to oppose the intervention, it would violate the statutory policy to allow the petition. Intervention would tend to make the private parties quasi attorneys general in enforcing the anti-trust laws, in contravention of 15 U.S.C.A. § 4 and 15 U.S.C.A. § 25 which explicitly require that Government suits

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[5] See also *United States* v. *American Society of Composers, Authors and Publishers*, 11 F.R.D. 511 (S.D.N.Y.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D.N.J.); *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228, 231 (W.D. Mo.).

shall be under the direction of the Attorney General.

Moreover, for still another reason, the district court's rejection of permissive intervention was well within the bounds of its discretion. Here, as in the *Sutphen Estates* case, *supra*, "the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene. The court had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere" (342 U.S. at 23). If appellant in fact is aggrieved by the potential loss of its Boston NBC affiliation, it has available at least three possible paths for relief: (1) filing a complaint with the Federal Communications Commission, which must still pass upon the public interest aspects of the proposed transfers of license (see Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. 310(b)); (2) instituting a private damage or injunctive action of its own under the antitrust laws (see 15 U.S.C. 15, 26); or (3) if it be not barred as contrary to public policy, bringing an action for breach of warranty arising out of NBC's alleged agreement, when it originally purchased the Philadelphia television station from Westinghouse, not to interfere with Westinghouse's NBC affiliation in Boston. (But cf. Federal Communications Commission Rules and Regulations, Section 3.658(c), 47 C.F.R. 3.658(c)). The district court was thus clearly acting within its reasonable discretion when it concluded

(R. A2) that appellant "if it is aggrieved, must be left to such private remedy as Congress may have provided for it".

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is therefore respectfully submitted that the appeal should be dismissed or the judgment of the district court should be affirmed.[6]

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[6] While we believe that the judgment below should be affirmed, we have drawn the motion in the alternative because, in some cases in which permissive intervention was in issue (as here), the Court, upon determining that no abuse of discretion was shown in the denial of intervention, has dismissed the appeal. E.g., *Sutphen Estates* v. *United States*, *supra*; see *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R. Co.*, *supra*, 331 U.S. 519, 524-525.

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